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No. 1067

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In the Supreme Court of the United States

OCTOBER TERM, 1962

JOHN ARTHUR LUOMOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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OCTOBER TERM, 1963

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on April 5, 1962. The petition for a writ of certiorari, filed more than a year later, on April 9, 1963, is out of time under Rule 22-2 of this Court's Rules and should be dismissed for that reason.

In any event, the petition is without merit. Following petitioner's conviction in the United States District Court for the Southern District of California for smuggling marihuana in violation of 21 U.S.C.

176a; a motion for new trial was argued and denied. When the court proceeded to the matter of sentence, petitioner's court-appointed counsel, Mr. Sheela, stated that he had just been informed that petitioner had engaged another attorney, Mr. Shamsky, and would like a continuance to present some matters prior to judgment (Pet. 21). Petitioner told the court that Mr. Sheela did not wish to represent him on an appeal and that he had therefore retained Mr. Shamsky who would present certain matters of which the court should know. In answer to the court's inquiry as to what those matters were, petitioner stated that he wished to call Dr. Roebuck and Mr. Pederson, the arresting officer. Dr. Roebuck, a psychiatrist who had already given his opinion on petitioner's sanity, would, petitioner said, testify to petitioner's previous occupations, which would show that petitioner was not a smuggler. Mr. Pederson would say that he believed petitioner was "set up". The United States Attorney pointed out that Mr. Pederson had testified and been cross-examined and that he had not communicated any desire to address the court at sentencing. (Pet. 22-25.) Government counsel informed the court that no one had heard from Mr. Shamsky (Pet. 23). When asked why Mr. Shamsky was not present, petitioner said that it was understood Mr. Sheela would handle the motion for a new trial and then withdraw (Pet. 23). The court refused petitioner's request and pronounced sentence, which was the minimum of five years' imprisonment (Pet. 25-26; 5).

Petitioner was not denied his right to representation by counsel at the time of his sentencing; he was represented by his trial counsel. The court was justified in refusing to delay the sentencing based upon petitioner's request, made at the last minute, to bring in substituted counsel. The United States Attorney's office had received no word of the proposed substitution and the attorney petitioner claimed to have retained was not present. The only purpose of bringing in the new attorney was to present two witnesses who, according to petitioner's offer, would have nothing relevant to bring to the attention of the court. The court's refusal to grant delay for this purpose was well within its area of discretion. *Neufield* v. *United States*, 118 F. 2d 375, 383-384 (C.A.D.C.), certiorari denied, 315 U.S. 798; *United States* v. *Paccione*, 224 F. 2d 801 (C.A. 2), certiorari denied, 350 U.S. 896; *Bilderback* v. *United States*, 249 F. 2d 271 (C.A. 5), certiorari denied, 356 U.S. 946; *Brown* v. *United States*, 264 F. 2d 363 (C.A.D.C.), certiorari denied, 360 U.S. 911. Since petitioner received the minimum sentence permissible under the statute, petitioner can in no event show prejudice.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

APRIL 1963.

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